

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
)	
Request for Waiver and Review of)	
Decision of the)	
Universal Service Administrator by)	
)	
St. Patrick Elementary School)	File No. SLD-170405 (FY 2000)
Frederiksted, St. Croix, Virgin Islands)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	

To: Telecommunications Access Policy Division, Wireline Competition Bureau

**ST. PATRICK ELEMENTARY SCHOOL
PETITION FOR RECONSIDERATION**

St. Patrick Elementary School (“St. Patrick”), pursuant to Section 1.106 of the Federal Communications Commission’s (“FCC” or “Commission”) rules, hereby petitions for reconsideration of the Order, DA 12-241, released on February 22, 2012, in the above-captioned matter.¹ The Universal Service Administrative Company (“USAC”) has demanded that St. Patrick reimburse funds distributed under the E-rate program to service providers *more than a decade ago*. This demand, if not overruled by the Commission, will have a detrimental financial impact on St. Patrick, including the very real possibility that St. Patrick will be forced to close or, at the very least, take drastic measures such as laying off faculty and administration or eliminating educational

¹ *In the Matter of Requests for Waiver and Review of the Decision of the Universal Service Administrator by Al-Ihsan Academy, Schools and Libraries Universal Service Support Mechanism*, File No. SLD-196013, *et al.*, CC Docket No. 02-6, Order, DA 12-241 (Wireline Comp. Bur. 2012) (“Order”).

programs. St. Patrick respectfully requests that the Commission reverse USAC's decision and direct USAC to discontinue recovery actions against St. Patrick for the reasons set forth below.

I. BACKGROUND

St. Patrick provides a Catholic education from pre-kindergarten through eighth grade in the small town of Frederiksted on St. Croix, an island with less than 55,000 residents. St. Patrick is located in the Catholic Diocese of St. Thomas in the Virgin Islands (the "Diocese"), which is the most impoverished Catholic Diocese in the entire United States. Due to depressed economic conditions in the area, St. Patrick's students come from poverty-stricken families. Indeed, the school qualifies for the maximum E-rate discount level of 90%. Yet, despite its small size and financial difficulties, St. Patrick is committed to providing its students with a comprehensive education within the Catholic faith. Such commitment includes ensuring its students have access to the critical technological resources that are available to students and educators in more affluent areas throughout the United States.

Given its financial constraints, St. Patrick applied for assistance from the E-rate program in Funding Year 2000 to fund Internet access and internal connections for its classrooms. The school filed the requisite forms with USAC. The school conducted an open and fair competitive bidding process as required by the Commission's rules. The school selected three vendors in accordance with those rules, and the services were installed.

Many years later, in 2006, USAC sought recovery of all funds paid for Funding Year 2000 as follows: (1) Funding Request Number ("FRN") 365796 in the amount of \$38,345.97, paid to Dell Marketing LP, (2) FRN 365883 in the amount of \$12,937.50, paid to Virgin Island Telephone Corp. d/b/a Innovative Telephone ("Innovative") and (3) FRN 365817 in the amount of \$86,287.41, paid to Lindsey Electronics, Inc. In total, USAC is demanding St. Patrick pay

\$137,570.88, which far exceeds St. Patrick's current resources.² USAC based its demand on four deficiencies allegedly discovered during an audit, including St. Patrick's alleged failure to pay any of the non-discount portion of the funded requests.

On March 28, 2007, St. Patrick filed a request for review of USAC's decision with the Commission.³ On February 22, 2012, the Commission released the Order denying the request, stating that USAC found that the subject petitioners "violated Commission rules by failing to pay the non-discounted portion of the price of the services that they purchased under the E-rate program."⁴

II. THE COMMISSION SHOULD REVERSE USAC'S DECISION

The Commission should reverse USAC's decision to recover the funds for the following three reasons.

First, USAC's assertion that St. Patrick did not pay the non-discount portion is incorrect. St. Patrick submitted documentation with the Request for Review to demonstrate that the non-discount portion payment was made to Dell. The Commission has granted appeals for other E-rate applicants that stated the non-discount portion was paid, even after USAC initiated

² Two other schools in the Diocese, St. Joseph High School and St. Mary's Catholic School, are concurrently filing similar Petitions for Reconsideration. The total recovery demanded from these three Diocesan schools is nearly \$400,000.

³ See *St. Patrick Elementary School*, Request for Review and Petition for Waiver, CC Docket No. 02-6 (March 28, 2007) ("*Request for Review*").

⁴ See Order at ¶ 1. The Order did not address the other three alleged deficiencies in St. Patrick's E-rate application process related to certification of financial resources, document retention and technology planning, findings which St. Patrick expressly appealed and refuted in its Request for Review. Indeed, the Order disposes of St. Patrick's Request for Review as follows, "[W]e find that the other 16 petitioners [which includes St. Patrick] did not pay their portion of the purchase price." *Id.* Accordingly, the Commission denied the Request for Review based solely on the alleged failure to pay the non-discount portion. To the extent necessary, however, St. Patrick preserves its right to appeal other matters raised in the Request for Review that were not discussed in the Order.

recovery of funds.⁵ Indeed, in the same Order denying St. Patrick's appeal, the Commission granted an appeal filed by Fairfield County School District which, like St. Patrick, submitted that it had paid the service provider (and that payment was made after USAC sought recovery).⁶ St. Patrick expects to be treated the same as similarly situated applicants and must therefore presume (since the Order does not specify) that the denial of its appeal is based on the FRNs associated with Innovative and Lindsey Electronics. At a minimum, the three FRNs at issue should be treated independently. St. Patrick has demonstrated payment of the non-discount portion for FRN 365796 and, as shown below, has paid its share for FRN 365817. It should not be required to reimburse funds for these FRNs.

Second, this is not a case where the school did not have sufficient funds or intent to pay the non-discount portion. As explained in the Request for Review, Innovative and Lindsey Electronics both failed to invoice St. Patrick for the non-discount portion. In fact, they *never* invoiced St. Patrick for those amounts. However, as soon as St. Patrick became aware that the non-discount portion was outstanding, it took action.⁷ It made repeated efforts to attempt to locate the owner of Lindsey Electronics in order to pay him. He could not be found. St. Patrick went even further and placed the non-discount portion for this FRN in third party escrow. St. Patrick continued to diligently search for Ronald Lindsey, the owner of Lindsey Electronics, and

⁵ See Order at ¶ 1 (granting request for review filed by Fairfield County School District). The Commission has also afforded applicants the opportunity to submit additional documentation showing payment of non-discount portions. See, e.g., Order; *In the Matter of Request for Review of the Decision of the Universal Service Administrator by United Talmudical Academy*, File No. SLD-148011, CC Docket No. 02-6, Order, 23 FCC Rcd. 15466 (Wireline Comp. Bur. 2008).

⁶ See Order at ¶ 1.

⁷ In terms of reconstructing history, it is worth noting that more than a decade has passed since these projects were installed and the relevant St. Patrick employees from that time have changed positions. Even the Commission's five-year documentation-retention requirement has long expired here. See 47 C.F.R. § 54.516.

was able to track him down in 2008 far from St. Thomas, in Atlanta, Georgia. On February 25, 2008, St. Patrick released the entire non-discount portion of \$9,587.49 from escrow to Mr. Lindsey, who expressed some surprise at receiving a payment he had never even invoiced or attempted to obtain.⁸ Similarly, upon learning that Innovative had also failed to properly invoice St. Patrick for the non-discount portion, St. Patrick placed the non-discount portion of \$1,437.5 for that FRN in third party escrow, where it has not been used despite St. Patrick's ongoing financial straits. St. Patrick indicated in the Request for Review that it would retain these funds in escrow until a Commission decision in this matter.

The Commission has previously recognized that service providers have an obligation to invoice the E-rate applicant for the non-discount portion and to follow up in efforts to collect payment.⁹ Here, an entire school may close because service providers did not properly invoice the school (despite their obligations to do so as beneficiaries of the E-rate program), did not pursue payment and, in one case, could not even be found to receive payment. St. Patrick, on the other hand, went above and beyond in an attempt to remit the payments properly and under the guidance of USAC and the Commission. As a result, one such payment has sat in escrow for years waiting Commission guidance. These facts are quite different from the precedent cited in the Order.¹⁰ In *IOSCO*, the applicant committed multiple rule violations, including not paying for the non-discount portion *despite* having apparently received invoices from the service

⁸ See Exhibit A.

⁹ See *In the Matter of Request for Review of a Decision of the Universal Service Administrator by Hispanic Information and Telecommunications Network, Inc.*, File No. SLD-194580, CC Docket No. 02-6, Order, 23 FCC Rcd. 15432 (Wireline Comp. Bur. 2008).

¹⁰ *Request for Review of the Decision of the Universal Service Administrator by IOSCO Regional Educational Service Agency, Schools and Libraries Universal Service Support Mechanism*, File Nos. SLD-108653, et al., CC Docket No. 02-6, Order, 24 FCC Rcd 12735 (Wireline Comp. Bur. 2009) ("*IOSCO*").

provider. IOSCO's consultant was also an employee of the service provider and the entire process was tainted. There was no indication that IOSCO could not locate the provider to pay it, as is the unusual case here.

When two of St. Patrick's providers have been paid the non-discount portion, and the funds wait in escrow to pay the third, it would be inherently unfair to force St. Patrick to pay to USAC all the monies that were disbursed to these providers, especially given the providers' failures described above.

Third, USAC erred in applying a Commission policy retroactively to St. Patrick. While St. Patrick did not pay all of the non-discount portions within 90 days of the date of service, that is simply irrelevant. The 90-day time period was not adopted by the Commission until 2004 – well after Funding Year 2000 and when services were delivered to St. Patrick.¹¹ The Commission has repeatedly made clear that new E-rate policies may not be applied to applications initiated prior to the adoption of the policy.¹² Furthermore, the Commission plainly stated in 2004 that the new 90-day policy would be applied “*prospectively*.”¹³ Prior to 2004, the Commission's rules contained no specific time frame for determining when an E-rate beneficiary has failed to pay its non-discounted share.¹⁴ The 90-day period, or indeed any specific period, is not applicable to St. Patrick's Funding Year 2000 application. This fact is critical because St.

¹¹ *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order and Order, 19 FCC Rcd 15808, 15816, ¶ 24 (2004) (“*Fifth Report and Order*”).

¹² See, e.g., *Request for Review of the Decision of the Universal Service Administrator by Keyport School District*, *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 24 FCC Rcd 12702 (Wireline Comp. Bur. 2009); *Requests for Review of Decisions of the Universal Service Administrator by Colegio Nuestra Senora del Carmen, et al.*, CC Docket No. 02-6, Order, 23 FCC Rcd 15568 (Wireline Comp. Bur. 2008).

¹³ *Fifth Report and Order*, 19 FCC Rcd at 15818.

¹⁴ *Id.*

Patrick has made payment and stands ready, as it has been from the start, to pay the non-discount portion to Innovative.¹⁵ Indeed, this amount remains in escrow pending a Commission decision. In the meantime, St. Patrick should not be penalized for the negligence of the service providers, particularly when St. Patrick has made extraordinary efforts to adhere to the program rules.¹⁶

III. THE RELIEF REQUESTED IS IN THE PUBLIC INTEREST AND A WAIVER IS JUSTIFIED

The denial of this Petition will have dire consequences to St. Patrick and possibly the Diocese itself. If the Commission deems it necessary to grant the relief requested herein, a waiver of Section 54.523 and such other Commission rules as are necessary is appropriate given the facts of this case and the significant hardship that would otherwise result.¹⁷

The grant of this Petition will further the public interest and will not undermine the policy behind the applicable rules. The Commission adopted the rule that E-rate beneficiaries must contribute at least ten percent of the cost of products and services in order “to encourage them to avoid unnecessary and wasteful expenditures because they will be unlikely to commit their own

¹⁵ St. Patrick requests that the Commission reverse USAC’s decision to recover the entire application amount, and would, upon the Commission’s grant of this Petition, immediately release the non-discount portion of \$1,437.50 from escrow to Innovative. St. Patrick would find it reasonable for the Commission to impose this payment as condition of such grant.

¹⁶ As stated above, St. Patrick should, at a minimum, be relieved from recovery for FRNs 365796 and 365817.

¹⁷ The Commission’s authority to grant waivers to further the public interest is well established. *See, e.g.*, 47 C.F.R. § 1.3; *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972) (“*Wait Radio*”). A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”). The Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio*, 418 F.2d at 1157. Waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. *Northeast Cellular*, 897 F.2d at 1166; *accord NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

funds for purchases that they cannot use effectively. A percentage discount also encourages schools and libraries to seek the best pre-discount price and to make informed, knowledgeable choices among their options.”¹⁸

St. Patrick did not engage in wasteful or unnecessary expenditures or operate under the belief that it would not have to share in the cost of the products and services. St. Patrick expected to pay the non-discount portion and did pay two of the service providers. The fact that Innovative and Lindsey Electronics did not invoice St. Patrick, and indeed Lindsey Electronics could not even be found for receipt of payment, surprised St. Patrick, and did not in any way influence St. Patrick’s competitive bidding process. St. Patrick’s good faith is amply demonstrated by the fact that it escrowed the non-discount portions (and one payment remains in escrow today) – even at a time when funds are desperately needed for St. Patrick’s educational expenses. There was no fraud, waste or abuse by St. Patrick. Rather, St. Patrick appears to be stuck between the proverbial rock and a hard place. USAC seeks recovery of nearly \$140,000 even though St. Patrick did pay two service providers and did not pay the third provider *through no fault of its own*, but stands ready to release escrowed funds to it.

The consequences of USAC’s recovery demand cannot be underestimated. The amount sought by USAC well exceeds St. Patrick’s current cash position, which is already operating at a significant deficit. According to the attached Affidavit by Jerry Esterson, the Director of Finance for the Diocese, St. Patrick is in severe financial straits and may be forced to close if required to pay these funds.¹⁹ St. Patrick is, in short, stunned that it might be required to pay nearly \$140,000 of funds that were paid to third parties over *eleven years ago* because its service

¹⁸ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9036 (1997) (subsequent history omitted).

¹⁹ See Exhibit B.

providers failed on their part and one actually disappeared. Surely, St. Patrick is entitled to some certainty and would not be expected to budget to make such payments eleven years later.²⁰

The public interest is far better served by a waiver in the instant case, than strict application of the rule.²¹ St. Patrick provides impoverished students a strong education for ten years of their lives grounded in Catholic teachings. The loss of this school, or a financial burden that might compromise its educational programs, will significantly impact St. Croix's small community. And if the Diocese attempted to pay the recovery on St. Patrick's behalf, the amount due would severely undermine the Diocese's financial position, possibly forcing it to declare bankruptcy.

The Commission has granted other E-rate applicants waivers based, in part, on the undue hardship that would follow if the waivers are not granted.²² As the Commission has observed in other cases, the relief requested for Funding Year 2000 will have minimal effect on the overall Universal Service Fund because the monies in question were not only already collected, but actually disbursed by USAC with no intention, at the time of such disbursement, of recovering such funds.²³

²⁰ The Commission recognized the inherent fairness in providing E-rate beneficiaries certainty and closure in E-rate applications and funding processes. *Fifth Report and Order*, 9 FCC Rcd 15808.

²¹ See *Northeast Cellular*, 897 F.2d at 1166.

²² See, e.g., *Application for Review of the Decision of the Universal Service Administrator by Aberdeen School District et al., Schools and Libraries Universal Service Support Mechanism*, File No. SLD-297249, et al., CC Docket No. 02-6, Order, 22 FCC Rcd 8757 (Wireline Comp. Bur. 2007); *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School et al., Schools and Libraries Universal Service Support Mechanism*, File No. SLD-487170, CC Docket No. 02-6, Order, 21 FCC Rcd 5316, 5326 (Wireline Comp. Bur. 2006) ("*Bishop Perry*").

²³ See, e.g., *Bishop Perry*, 21 FCC Rcd at 5317, ¶ 2.

IV. CONCLUSION

St. Patrick respectfully requests that the Commission reverse USAC's commitment adjustments for Funding Year 2000 and direct USAC to discontinue recovery actions against St. Patrick.

Respectfully submitted,

**ST. PATRICK ELEMENTARY
SCHOOL**

By: /s/ Donna A. Balaguer
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March 23, 2012

Counsel to the Catholic Diocese of
St. Thomas in the Virgin Islands

EXHIBIT A

5:04 PM
03/14/12
Cash Basis

ESCROW-COLIANNI & COLIANNI
Transactions by Account
All Transactions

Type	Date	Num	Name	Memo	Original Amount	Balance
St Patricks Church-Mar28 07						
Dell-St. P. Mar 28 07						
Deposit	3/28/07	15611		Dep-St. P	4,265.38	4,265.38
Total Dell-St. P. Mar 28 07						4,265.38
Innovative- St.P. mar 28 07						
Deposit	3/28/07	15612		Dep-St. P	1,437.50	1,437.50
Total Innovative- St.P. mar 28 07						1,437.50
Lindsay Electr- St.P mar 28 07						
Deposit	3/28/07	782		Dep-St. P	9,587.49	9,587.49
Check	2/25/08	1086	Ronald Lindsey	Work in St. Patrick School	-9,587.49	0.00
Total Lindsay Electr- St.P mar 28 07						0.00
Total St Patricks Church-Mar28 07						5,702.88
TOTAL						5,702.88

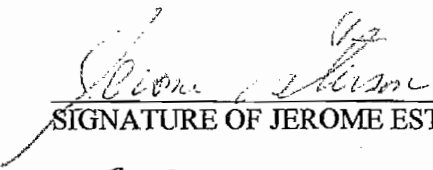
EXHIBIT B

AFFIDAVIT OF JEROME ESTERSON

I, Jerome Esterson, hereby declare and affirm that the following statements are true and correct.

1. I am over 18 years of age and competent to attest to the matters described herein. I have personal knowledge of the facts set forth herein.
2. I am the Director of Finance for the Catholic Diocese of St. Thomas in the Virgin Islands ("Diocese"). I am responsible for and familiar with the financial budgets and forecasts of the Diocese and its constituent institutions.
3. I have reviewed the financial status of three Catholic schools within the Diocese: St. Joseph High School, St. Mary's Catholic School and St. Patrick Elementary School (the "Schools"). I have reviewed the requests issued by the Universal Service Administrative Company ("USAC") to the Schools demanding repayment of E-rate funds issued to service providers for Funding Year 2000. The total demand for all three schools is nearly \$395,000. Neither the Schools, respectively, nor the Diocese has surplus funds within their budgets to pay this expense.
4. If the Schools are required to comply with USAC's recovery demands, it will have a devastating financial impact on these institutions and the Diocese's ability to support and provide Catholic education to students. This impact is likely to include shutting down schools, eliminating educational programs and laying off faculty and administration.
5. St. Joseph High School is the only Catholic high school on St. Croix. St. Joseph is currently operating under a financial deficit. As of March 20, 2012, St. Joseph is operating at a loss of over \$60,000. Student enrollment declined from last year by fifteen percent. Bishop Herbert A. Bevard and Father E. Patrick Lynch, the Superintendent of Schools, are attempting to keep the school open by the hiring of a new principal and encouraging enrollment. The unexpected USAC demand for payment may destroy these plans. If St. Joseph is required to pay all of the funds demanded, the Diocese must consider shutting the school down.
6. St. Mary's Catholic School is currently operating under a financial deficit. As of March 20, 2012, St. Mary's is operating at a loss of over \$130,000. If St. Mary's is required to pay all of the funds demanded by USAC, the Diocese must consider shutting the school down or implementing other drastic measures, such as laying off faculty and administration or eliminating educational programs.
7. St. Patrick Elementary School is currently operating under a financial deficit. As of March 20, 2012, St. Patrick is operating at a loss of over \$30,000. If St. Patrick is required to pay all of the funds demanded by USAC, the Diocese must consider

shutting the school down or implementing other drastic measures, such as laying off faculty and administration or eliminating educational programs.


SIGNATURE OF JEROME ESTERSON

3-23-12
DATE

WITNESS:

Signature: Valerie Doute

Print Name: VALERIE Doute

Date: March 23, 2012